

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

**VIRGINIA MASON HOSPITAL (a Division of
VIRGINIA MASON HOSPITAL CENTER)**

and

Case 19-CA-30154

WASHINGTON STATE NURSES ASSOCIATION

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for the General Counsel.

Lawrence R. Schwerin, Esq., Seattle, WA,
for the Charging Party.

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for the Respondent.

SUPPLEMENTAL DECISION

GREGORY Z. MEYERSON, Administrative Law Judge. On September 12, 2006, I issued a Decision in the above captioned matter. Thereafter, on August 23, 2011, the National Labor Relations Board (the Board) issued a Decision and Order Remanding this case to me. *Virginia Mason Hospital (a Division of Virginia Mason Hospital Center)*, 357 NLRB No. 53 (August 23, 2011). In its Order remanding the case, the Board directed me to specifically address certain defenses raised by the Respondent in response to the General Counsel's allegations that the Respondent has failed and refused to bargain with the Union over the imposition of a flu-prevention policy.

Subsequent to the Board's Order, I conducted a telephone conference with respective counsel representing the three parties to this matter. During that conference call, counsel for each of the parties agreed that in order to address the issues raised by the Board in its Remand Order it was unnecessary to reopen the record in this case. I then set a briefing schedule for the parties to submit supplemental briefs on the issues raised by the Board, cautioning counsel that each supplemental brief should be a self contained document addressing the issues, as I would specifically not be consulting the original briefs filed by the parties in this case. Thereafter, timely briefs were filed by counsel for the General Counsel, counsel for the Respondent (Virginia Mason Hospital, the Employer, or the Hospital), and counsel for the Charging Party (the Union or the Washington State Nurses Association).

Based upon the record made in this case during its trial before me in Seattle Washington on June 13-16, and July 11, 2006, and my consideration of the supplemental briefs filed by the parties, I will now address those issues as directed by the Board in its Remand Order.

Background Facts

5 The facts in this case are as found in the Board's Decision. However, in an effort to place the issues before me in context, I will set forth set forth the pertinent facts again.

10 The Respondent is an acute care hospital in Seattle, Washington. It employees approximately 5000 employees, of which approximately 600 are registered nurses represented by the Union. At all times material herein, the Respondent and the Union were parties to a collective bargaining agreement effective from November 16, 2004, through November 15, 2007. (G.C. Ex. 22.)

15 In September 2004, the Hospital announced that it was amending its "Fitness for Duty" policy to require its entire work force to be immunized against the flu. The Union grieved this change on behalf of the Union. Subsequently, an arbitrator issued an award in favor of the Union. As a result, the Hospital has not required the nurses to be immunized.

20 In October and November 2005, at monthly meetings of a joint labor-management advisory committee, the Hospital informed the Union that it was considering requiring nonimmunized nurses either to wear a protective facemask or to take antiviral medication. The Hospital made it clear that its interest in requiring nonimmunized nurses to take such prophylactic measures was intended to protect its patients, many of whom were elderly, other employees, and visitors to the hospital from contracting influenza. While during the course of the next several months, Hospital and Union officials had a number of discussions and
25 exchanged correspondence over this matter, it is beyond reasonable dispute that no genuine collective bargaining was conducted between the parties regarding the proposal.

30 On January 1, 2006, the Hospital implemented a flu-prevention policy requiring nonimmunized registered nurses to wear a facemask or take antiviral medication. A registered nurse in the critical care department testified that thereafter, she was required to wear a facemask at all times except when she was in the rest room, break room, or cafeteria. At the time, the Hospital defended its new flu-prevention policy as within the Hospital's right to set a "standard of practice" under the managerial-rights provision of the collective bargaining agreement. Further, the Hospital's attorney indicated their intention to handle any
35 noncompliance with the policy through the "standard process," which might include progressive discipline.

The Hospital's Defenses

40 In response to the allegation in the Complaint and Notice of Hearing dated April 28, 2006 (the complaint) (G.C. Ex. 1(e)) that the Respondent had failed to bargain with the Union and had engaged in an unlawful unilateral change by implementing its flu-prevention policy, the Hospital originally raised four defenses. The Hospital contended that it had no duty to bargain before implementing the policy in question because (1) the policy went to the Hospital's "core purpose" and was exempt from mandatory bargaining under *Peerless Publications*, 283 NLRB 334
45 (1987); (2) the decision to implement the policy was subject to the balancing test the Supreme Court set forth in *First National Maintenance Corp. v NLRB*, 452 U.S. 666(1981), and applying that test, the balance tipped in favor of exempting the decision from mandatory bargaining; (3) Federal and State law required the Hospital to implement effective policies to control infection and communicable diseases; and (4) the Union waived bargaining when it agreed to the management-rights and zipper clauses of the parties collective bargaining agreement.
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In my original decision, I found that the Hospital's implementation of the flu-prevention policy was exempt from bargaining under *Peerless*. I relied solely on that rationale in dismissing the unilateral change allegation and, therefore, I did not address any of the Hospital's other defenses. In its Decision and Order Remanding, the Board, for the reasons expressed in that decision, reversed my finding that the flu-prevention policy was exempt from bargaining under *Peerless*. The Board remanded this case to me specifically to address the Respondent's other defenses. Further, the Board suggested that I seek supplemental briefs from the parties as to the application to this case of *Provena St. Josepha Medical Center*, 350 NLRB 808 (2007).

As I noted above, all parties have filed supplemental briefs, and, among other issues, have discussed the application of *Provena*. However, I should note that while counsel for the General Counsel and counsel for the Union discussed all remaining defenses originally raised by the Respondent, as enumerated by the Board in its Remand Order, counsel for the Respondent has only discussed the defense related to whether the Union waived bargaining when it agreed to the management-rights and zipper clauses of the parties' collective bargaining agreement. I find this rather puzzling, since the Respondent does not specifically state that it is no longer raising those other defenses. Therefore, I am unfortunately left to simply guess what position the Respondent now takes on its other original defenses.

Finally, I would simply note that the record evidence shows no genuine effort on the part of the Respondent to negotiate over this matter with the Union. For all practical purposes, the Respondent implemented its flu-prevention policy with the nurses unilaterally and presented it to the Union as a *fait accompli*, without the give and take of true bargaining. Mere discussions at a joint labor-management committee did not constitute bargaining. Accordingly, unless the Respondent is able to demonstrate a legitimate defense, its failure to bargain with the Union before implementing the flu-prevention policy constitutes an unfair labor practice.

Legal Analysis and Conclusion

Regarding the Respondent's original defense that Federal and State law required the Hospital to implement effective policies to control infection and communicable diseases and, thus, to implement its flu-prevention policy, I find this argument to be without merit. As both counsel for the General Counsel and counsel for the Union point out in their supplemental briefs, the Center for Disease Control (CDC) regulations permit health care institutions to exercise discretion as to when, and for how long, a registered nurse (RN) should be required to wear a facemask. The un rebutted testimony at the hearing was that under the CDC guidelines, RNs, and other health care personnel, should wear a mask when in close contact with a patient who has symptoms of a respiratory infection. Being in close contact is generally defined by the CDC as being "within 3 feet of a droplet source."¹ (G.C. Ex. 14, tab 6.) It does not require or even suggest that RNs wear a mask at all times, except for breaks and restroom use. Further, the un rebutted evidence showed that Washington State law required health care providers to follow an "accepted standard of care."² Presumably, that would mirror the CDC guidelines.

Most telling, at the hearing, the Respondent could not point to a single Federal or State law or regulation mandating that registered nurses who are not immunized against influenza or not taking antiviral medication be required to wear facemasks at all times when exposed to patients or members of the public. Absolutely no evidence was produced by the Respondent at

¹ CDC 2004-2005, *Interim Guidance for the Use of Masks to Control Influenza Transmission*.

² *Washington State Statute*, RCW 7.70.040.

the hearing to show that a single hospital anywhere in the United States required its nurses or other personnel to wear a facemask over such an extended period of time when working. Accordingly, I must reject the Respondent's argument that it was **required** by law to implement its flu-prevention policy, and, therefore, was not required to bargain with the Union over that policy.

Another defense originally argued by the Respondent was that its decision to implement its flu-prevention policy was entrepreneurial and/or managerial in nature, and, thus, it was not required to negotiate over this policy with the Union. I also find this argument to be without merit. In its Remand Order, the Board stated that the Hospital's decision to require nonimmunized nurses who declined to take antiviral medication to wear a facemask "plainly affected their working conditions," and that such "work rules enforceable through discipline are mandatory subjects of bargaining." The Board cited *Praxair, Inc.*, 317 NLRB 435, 436 (1995). As a mandatory subject of bargaining, it is axiomatic that the Respondent's failure to bargain over the implementation of its flu-prevention policy, absent a successful defense, is a violation of the Act.

However, in *First National Maintenance v. NLRB*, 452 NLRB 666 (1981), the Supreme Court announced a balancing test regarding an employer's duty to bargain over certain fundamental business decisions. The employer operated a cleaning and maintenance business pursuant to which it contracted with commercial customers to provide cleaning services, a labor force, and supervision in return for a management fee. The employer cancelled its contract with a customer, failing to bargain with the union representing its employees about either the decision to terminate the contract or the effects of that decision on its employees. The Supreme Court's holding was limited to the issue of the decision to cancel the contract. The Court concluded that the decision involved a change in the "scope and direction of the enterprise," which was akin to the decision as to whether to be in business at all. The Court further concluded that a subject involves "mandatory bargaining" only where the subject proposed for discussion is "amenable to resolution through the bargaining process." Under the specific facts in this case, the Court struck a balance in favor of the employer's interest in running a profitable business and the flexibility needed to do so. It held that the employer did not have a duty to bargain over this decision.

After reflecting on the nature of the change made by the Respondent, that being to require its nurses to wear facemasks for extended periods of time, which as the Board found, clearly affected their working conditions, I am now of the view that it falls outside the scope of the *First National Maintenance* balancing test. This change in the Hospital's flu-prevention policy simply did not have a substantial impact on the continued availability of employment due to relocation/closure, nor did it truly relate to a change in the scope and direction of the Hospital's business, and it certainly was not based on economic considerations. In fact, the change would be directly amenable to the collective bargaining process, assuming no other factors interpose themselves. Accordingly, I believe that the *First National Maintenance* balancing test is inapplicable here, and I reject this deference originally raised by the Respondent.

I will now turn my attention to that defense, which the Respondent contends in its supplemental brief obviates the requirement that it negotiate with the Union over the flu-prevention policy, namely its argument that the Union waived bargaining over that issue when it agreed to the management-rights and zipper clauses of the parties' collective bargaining agreement. This defense arises in *Provena St. Joseph Medical Center, supra*, which case the Board suggested in its Remand Order that the parties specifically address.

In *Provena*, the Board reaffirmed its “adherence to one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees’ terms and conditions of employment during the life of a collective bargaining agreement.” Citing a labor law treatise,³ the Board set forth certain well established principles: “A party may contractually waive its right to bargain about a subject. Where such a waiver is claimed, the test is whether the putative waiver is in ‘clear and unmistakable language’.... When a ‘management-rights’ clause is the source of an asserted waiver, it is normally scrutinized by the Board to ascertain whether it affords specific justification for unilateral action.”

The Board noted, citing *C & C Plywood*, 148 NLRB 414, 416-417 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), that “granting an employer the right to act unilaterally with respect to employment terms that are subject to bargaining under the Act ‘is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact.’” Specifically in addressing a newly implemented disciplinary policy on attendance and tardiness, the Board found that the employer did not violate the Act because several provisions of the management-rights clause, taken together, explicitly authorized the Respondent’s unilateral action. According to the Board, “[b]y agreeing to that combination of provisions, the [u]nion relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.” In the Board’s view, the waiver was clear and unmistakable.

In several cases following *Provena*, the Board continued to adhere to its clear and unmistakable waiver doctrine, holding that based on the language in management-rights clauses in these specific collective bargaining agreements, the employers’ unilateral changes had not violated the Act. The Board said in *Baptist Hospital of East Tennessee*, 350 NLRB 71 (2007) that in deciding the employer’s unilateral modification of the holiday scheduling system did not violate the Act, it found, after reading a number of management-rights provisions in the collective bargaining agreement “in conjunction” with each other, that the union’s waiver to bargain over this matter was clear and unmistakable. In *Quebecor World Mt. Morris II, LLC*, 353 NLRB No. 1 (2008), the Board found that when the union agreed to two management-rights provisions in the contract that it had “plainly authorized” the employer to unilaterally implement a new performance improvement plan (PIP). The Board looked at these two provisions “in combination.” *Id* at *4. Thus, the Board finds it appropriate to look at management-rights clause language collectively where that combination of clauses clearly and unmistakably establishes the union’s willingness to waive bargaining over a particular matter.

In the case before me, it is now necessary to look at the specific contract language as contained in the management-rights and zipper clauses. The management-rights clause in the collective bargaining agreement between the parties is entitled “Management Responsibilities” and can be found at Article 18 of that contract. (G.C. Ex. 22.) Section 18.1 endows the Respondent with an enumerated set of explicit rights. Under this clause, the Union “recognizes the right of the Hospital to operate and manage the Hospital, including but not limited to the right to require standards of performance and...to direct the nurses...to determine the materials and equipment to be used; to implement improved operational methods and procedures...to discipline, demote or discharge nurses for just cause...and to promulgate rules, regulations and personnel policies....”

³ *The Developing Labor Law* 1006-1007, 1014 (5th ed. 2006, John E. Higgins, Jr. Ed.)

While the management-rights clause at issue herein does not specifically mention the wearing of facemasks, it does specifically allow the Hospital to unilaterally “direct the nurses” and “to determine the materials and equipment to be used; [and] to implement improved operational methods and procedures.” In that regard, it is instructive to look at various internal Hospital documents, which were in effect during the time period in question. The Hospital’s “Infection Control Manual” and attachments to it, specifically an “Infection Precautions: Screening & Implementation” guideline dated December of 2003, directs that all personnel, including nurses, will adhere to certain precautions. Those precautions require that when screening or evaluating patients, health care workers are expected to “use surgical masks ... when evaluating patients with respiratory symptoms (Droplet Precautions).” (Res. Ex. 3, Infection Precaution: Screening & Implementation, p. 5.1.). Further, under the guideline heading “Precaution Strategies: Standard, Contact, Droplet, Airborne, and Protective,” dated January 1, 2004, “Masks (Surgical) and Eye Protection” are “[r]equired if there is close contact with the patient such that contact with sprayed blood, secretions, drainage, or excretions is anticipated.” (Res. Ex. 3, Precaution Strategies..., p. 7.4.)

Thus, even though facemasks are not specifically named in the management-rights clause of the contract, requiring the wearing of facemasks in certain situations is described in various written infection control guidelines, which apply to the nurses. Therefore, it seems clear and unmistakable that language in the management-rights clause, which gives the Hospital the authority “to determine the materials and equipment to be used [and] to implement improved operational methods and procedures,” would include requiring nurses who have not been immunized against the flu and who have declined to take antiviral medication to wear a facemask when in contact with patients, fellow employees, and visitors to the Hospital. This is simply an extension of the infection control guidelines already in effect, which extension is clearly permitted under the language of the management-rights clause.

This defense is further supported by the testimony of Charleen Tachibana, the Hospital’s Senior Vice-President and Chief Nursing Officer. According to Tachibana, the Hospital is required to have in place infection control policies and practices that mitigate, control, and prevent infections from spreading. The Hospital has such policies and practices in effect as are reflected above in its “Infection Control Manual.” (Res. Ex. 3.) Tachibana’s unrebutted testimony was that the Hospital has never bargained with the Union over any aspect of the Infection Control Policy. Further, she testified that the “protective equipment” referred to in the Policy would typically include a gown, latex gloves, and facemasks. Moreover, Tachibana contends that prior to the dispute in question, the Union had never challenged or objected to the required wearing of latex gloves, gowns, or the required wearing of facemasks in the operating rooms.

Since a facemask is obviously equipment under the Hospital’s Infection Control Policy, the management-rights clause authorizes the Hospital to unilaterally create rules and improve procedures related to the use of facemasks by nurses and to enforce those rules and procedures with discipline. That was precisely what the Respondent did when it announced a policy requiring its nurses who were not immunized against influenza and who were not taking antiviral medication to wear facemasks when in contact with patients, fellow employees, and members of public, except while on break or in the bathroom. Under the Board’s clear and unmistakable standard as annunciated in *Provena, supra*, the Union waived its right to bargain over the change in the Respondent’s Infection Control Policy as it applied to the wearing of facemasks when it agreed to the management-rights clause in the collective bargaining agreement.

In addition to the management-rights clause, the collective bargaining agreement between the parties also contained what is usually referred to as a “zipper clause.” Article 20, Section 20.4 is headed “Complete Understanding.” (G.C. Ex. 22.) It states in part that the parties agree that during the term of the contract they “shall not be obligated to bargain collectively with respect to any subject or matter not specifically discussed during negotiations or covered in this Agreement.” It is the Respondent’s position that when the zipper clause is read in conjunction with the management-rights clause it strengthens the argument that the Union waived bargaining over the requirement that nurses who are not immunized or taking antiviral medication wear facemasks. However, in my view, the management-rights clause and its impact on this issue is sufficiently clear and unmistakable based on that language alone, without the need to combine it with the zipper clause language.

The zipper clause language is somewhat problematic, as it references “any subject or matter not specifically discussed during negotiations.” Prior to implementing its flu-prevention policy, which required nonimmunized nurses who were not on antiviral medication to wear facemasks, which is the policy under dispute in this case, the Respondent attempted to require that all employees be immunized against influenza. The Union objected to the initial immunization policy, filed a grievance, and brought their objection to a successful arbitration decision that was sustained on appeal. (G.C. Ex. 23.), *Virginia Mason Hospital v. Washington State Nurses Assn.*, No. C05-1434MJP, 2006 WL 27203 (W.D. Wash. 2006), *affd.* 511 F.3d 908 (9th Cir. 2007). While I am not bound by the facts as found by the arbitrator, it appears that he found, regarding the initial mandatory immunization policy, that there had been negotiations between the parties over this issue. However, in my view, the Respondent’s initial immunization policy, requiring that all employees, including nurses, be immunized against influenza, was significantly different than the implementation of the flu-prevention policy that is before me, namely a requirement that nonimmunized nurses who are not taking antiviral medication wear facemasks. Still, the underlying facts regarding negotiations on the initial mandatory immunization policy, as found by the arbitrator, are sufficiently in dispute as to make me reluctant and unwilling to rely on the zipper clause language in deciding the issues in this case. Therefore, I decline to do so.

In any event, as I have said, the language in the management-rights clause alone is sufficiently clear and unmistakable so as to conclude that by those contract terms, the Union waived its right to negotiate with the Respondent over the flu-prevention policy now in place, which requires nonimmunized nurses who are not taking antiviral medication to wear facemasks. I so find, and also conclude that the Respondent’s failure to negotiate with the union over this matter was privileged by the Union’s waiver, and, therefore, that refusal to negotiate and concomitantly to unilaterally implement the policy did not constitute an unfair labor practice under Section 8(a)(5) and (1) of the Act. Accordingly, I hereby recommend to the Board that complaint paragraph 8, and all its subparagraphs, be dismissed.

Dated at Washington, D. C. November 25, 2011

Gregory Z. Meyerson
Administrative Law Judge